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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0267**

State of Minnesota,
Respondent,

vs.

Walter Davis,
Appellant.

**Filed February 10, 2014
Affirmed
Smith, Judge**

Hennepin County District Court
File No. 27-CR-12-16903

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Elizabeth A. R. Johnston, Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Johnson, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm appellant's convictions for second-degree burglary and second-degree aiding and abetting burglary because the delay in bringing appellant to trial did not rise to the level of a violation of his constitutional right to a speedy trial.

FACTS

In February 2012, appellant Walter Davis stole a television and other personal property from a home in Minneapolis. After an investigation, the state charged Davis with second-degree burglary and second-degree aiding and abetting burglary.

At an omnibus hearing on August 16, 2012, Davis asserted his constitutional right to a speedy trial. The district court scheduled his trial for October 2. Davis told the district court that he was being held in jail on an unrelated sentence for 90 days.

At a hearing on October 2, the state moved the district court to postpone the trial, citing the unavailability of two key witnesses. Davis opposed the motion and reasserted his speedy-trial demand. He argued that the reason for each witnesses' unavailability—the impending birth of a child—had been known at the time of the August 16 hearing, and that the state should therefore be required to adhere to the originally scheduled trial date. The state responded that it had “no control over the availability of these particular witnesses and [was] not doing anything to prolong their unavailability.” The district court granted the state's motion for a continuance, ruling that the witnesses' knowledge of their pregnancies could not be imputed to the state and that the unavailability of the

witnesses constituted good cause for delaying Davis's trial. It rescheduled the trial for November 5.

After a bench trial, the district court found Davis guilty of both charges, and it sentenced him to 48 months' imprisonment.

D E C I S I O N

Criminal defendants have a constitutional right to a speedy trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. To protect this right, the Minnesota Rules of Criminal Procedure require that “[o]n demand of any party, the trial must start within 60 days of the demand unless the court finds good cause for a later trial date.” Minn. R. Crim. P. 11.09. The prosecution and the district court bear the primary responsibility to ensure that a defendant's speedy-trial right is protected. *State v. Windish*, 590 N.W.2d 311, 316 (Minn. 1999). We review de novo whether a defendant was denied his constitutional right to a speedy trial. *State v. Griffin*, 760 N.W.2d 336, 339 (Minn. App. 2009).

The state concedes that Davis's trial began 82 days after his first speedy-trial demand, so the issue here is whether the state demonstrated “good cause” for the delay. To determine whether the state demonstrated good cause for delay, we consider “(1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his . . . right to a speedy trial; and (4) whether the delay prejudiced the defendant.” *Windish*, 590 N.W.2d at 315. “[N]one of the four factors identified above [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as

may be relevant.”” *Barker v. Wingo*, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193 (1972).

We address each factor in turn.

Length of Delay

The parties agree that the 82-day time period between Davis’s first speedy-trial demand and the beginning of his trial is “presumptively prejudicial.” *See Windish*, 590 N.W.2d at 315–16. But standing alone, the length of time “does not . . . provide strong support for finding a violation” of a defendant’s speedy-trial rights. *State v. Rhoads*, 802 N.W.2d 794, 806–07 (Minn. App. 2011), *rev’d on other grounds*, 813 N.W.2d 880 (Minn. 2012). Instead, a “material delay” in excess of the 60-day time limit is only “sufficient to trigger further inquiry.” *Id.* at 806.

Reasons for Delay

“[P]rosecutors are obligated to make a good faith effort to bring a defendant to trial.” *Windish*, 590 N.W.2d at 316–17. But unavailability of a witness is good cause for delay, provided that prosecutors were “diligent” in attempting to make the witness available and the unavailability does not prejudice the defendant. *Id.* at 317.

Davis argues that the witnesses would have known of their unavailability at the time they received their subpoenas and “their delay [in communicating their unavailability to the state] works to the state’s detriment” under this factor because the state bears the responsibility to protect a defendant’s speedy-trial right. He also alleges that the prosecutor’s claim that the victim was unavailable due to pregnancy lacked supporting evidence. But the district court found credible the prosecutor’s statements

establishing his diligence, and we defer to its credibility determination. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

Davis also contends that the unavailability of the witnesses was not good cause in this case because the unavailable witnesses could have been called out of order or not called at all. But he cites no authority that such an alternative, even if available,¹ undermines the general rule that unavailability of witnesses is good cause for delaying a trial. *See Windish*, 590 N.W.2d at 317.

Defendant’s Assertion of Speedy-Trial Right

The state concedes that Davis asserted his speedy-trial right as early as August 16, 2012. But this factor weighs only “slightly” in favor of Davis’s claim that he was denied his constitutional speedy-trial right. *See id.* at 318.

Prejudice to Defendant

The speedy-trial right protects defendants in three ways: “(1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be prejudiced.” *Id.* But when, as here, a defendant is incarcerated during the delay on an unrelated charge, only the possibility of prejudicing the defense is relevant. *See id.* Although a defendant need not “affirmatively prove” that he was prejudiced by a delay, he must at least suggest “likely harm to [his] case.” *Id.* Davis alleges no prejudice to his case resulting from the delay. Although we are mindful that “an excessive delay presumptively compromises the

¹ Since one of the unavailable witnesses was the victim, it seems unlikely that the state could have proceeded without calling her at all.

reliability of a trial in ways that cannot be identified,” *Griffin*, 760 N.W.2d at 341 (quotation omitted), the delay here was a relatively brief 22 days beyond the time limit, and the record contains no indication that either testimony or evidence was compromised during that period. *Cf. State v. Helenbolt*, 334 N.W.2d 400, 404–06 (Minn. 1983) (finding no constitutional speedy-trial violation in a fourteen-month delay in part because defendant’s “only serious allegation of prejudice [was] the impairment of his defense by faulty witness memories” but where the record contained no indication that defense witnesses’ memories were faulty). Accordingly, this factor does not weigh in Davis’s favor.

Because only the length of delay and his assertion of his speedy-trial right weighs in Davis’s favor and because, standing alone, these factors do not rise to the level of a constitutional violation, *see Rhoads*, 802 N.W.2d at 806–07, Davis was not denied his constitutional right to a speedy trial.

Affirmed.